IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

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No. _____ 76-1777

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JAMES W. BENSON AND ONE 1968 VOLKSWAGEN,
Petitioners.

vs.

STATE OF NEBRASKA,
Respondent.

---o---

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

---o---

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James W. Benson prays that a writ of certiorari issue to review the judgments of the Supreme Court of the State of Nebraska, entered in *State v. Benson* and *State v. One 1968 Volkswagen* on March 16, 1977.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Nebraska in *State v. Benson,* printed in Appendix A hereto, *infra,* p. 11, is reported in 198 Neb. 14, ____ N. W. 2d ____ (1977). The opinion of the Supreme Court of the State of Nebraska in *State v. One 1968 Volkswagen,*

printed in appendix A hereto, *infra*, p.____, is reported in 198 Neb. 45, ____ N. W. 2d ____ (1977).

JURISDICTION

The judgment of the Supreme Court of the State of Nebraska in *State v. Benson*, was entered on March 16, 1977, p. 11, *infra*. The judgment of the Supreme Court of the State of Nebraska in *State v. One 1968 Volkswagen* was entered on March 16, 1977, p. 40, *infra*. The jurisdiction of this Court is invokved under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether, consistent with the fourth amendment, a detention stop of a motor vehicle may be made without specific articulable facts justifying founded suspicion, merely because a state has enacted a statute interpreted to allow stopping of vehicles at any time to check license and registration.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Nebraska Revised Statute, Chapter 60, section 435 (1943) provides, in pertinent part:

> The superintendent and all members of the Nebraska State Patrol and all other peace officers mentioned in section 39-6,192, shall have the power . . . . when in uniform, to require the driver thereof [of a vehicle on state highways] to stop and exhibit his operator's license and registration card issued for the vehicle and submit to an inspection of such vehicle, the registration plates and registration card thereon . . .

STATEMENT OF THE CASE

The Proceedings in the Court Below

Information was filed in the District Court of Lancaster County, Nebraska against James W. Benson, petitioner, alleging possession of marijuana, amphetamine and codeine, and carrying a concealed pistol (R. 3,4). Transcript of county court proceedings (R. 5-21) was filed. Petitioner then filed Motion to Suppress and Request for Evidentiary Hearing, alleging a denial of his rights under the fourth amendment to the Constitution of the United States by reason of unlawful detention, search, and seizure and abuse of power with respect to the detention of the vehicle occupied by petitioner (R. 22). Hearing was held upon said Motion and evidence was presented (R. 24). Briefs were submitted and the Motion was denied by the court (R. 26). Trial was held, jury waived, during which the record of the suppression hearing was presented to the court and petitioner renewed his Motion to Suppress. The court overruled the motion (R. 27), judgment of conviction was entered (R. 24), and sentence imposed (R. 30).

Appeal followed to the Supreme Court of the State of Nebraska, with assignment of the following errors: 1) denial of the Motion to Suppress, 2) denial of the renewal of the Motion to Suppress and conviction based upon evidence which should have been suppressed, and 3) failure to protect petitioner from the use of unconstitutionally obtained evidence.

The Factual Background

In the hearing on the Motion to Suppress, Dennis L. Hogue, a trooper for the Nebraska State Patrol, was called by the petitioner as a witness (Bill of Exceptions, hereinafter BE 12:10). He testified that on October 16, 1974 he was on duty and travelling along Interstate 80, behind petitioner's vehicle, when he overheard a dispatch from the Wahoo County Sheriff's Office (BE 16:11). He recalled that the dispatch warned troopers in Wahoo to look for a white or cream-colored Volkswagen van pulling a U-Haul trailer with California license plates and requested that the van be stopped and checked for stolen antique furniture (BE 17:2). Later testimony of the Wahoo dispatcher, Delores Dorothy, supported by her dispatch log, conflicts with Trooper Hogue's testimony on this communication. According to the dispatcher, much less detail was given in the description of the vehicle (BE 121:18).

Upon noticing the petitioner's vehicle, Mr. Hogue, through his office, communicated with the Wahoo Sheriff's Office concerning its earlier dispatch, and discovered that no warrants had been issued for either the van or its occupants in connection with the supposed antique theft (BE 22:4).

Trooper Hogue then passed the van in order to scrutinize it and, although he noticed nothing unusual about its movements or operation, he stated that he saw no renewal sticker on the front license plate (BE 23:8). In response to questioning, Mr. Hogue admitted that he had no reason to believe that California plates require anything other than what was present on the front of the vehicle, but said that it is hard to keep up with California licensing procedures, since they change so often (BE 24:1). In fact, the California method of registration has not changed for over thirty years, and the vehicle driven by petitioner was fully in compliance.

The Trooper then radioed for assistance and stopped petitioner's vehicle, after which the objectionable search and seizure took place.

REASONS FOR ALLOWING THE WRIT

A state statute cannot be interpreted so as to emasculate a constitutional right.

The Nebraska Supreme Court, in its opinion of the present case (Appendix A, *infra*, p. 11) agrees with defendant's argument that the radio message, standing alone, does not prove legal cause for the detention stop. The court does not rule directly on the implications of the officer's alleged concern over the registration of the vehicle, but its conclusions entail a finding that there was no founded suspicion that the registration was not in order.

The Nebraska court goes on to say:

> "The general rule is that a detention stop violates the Fourth Amendment unless specific articulable

> facts taken together with rational inferences from those facts reasonably warranted a founded suspicion that a person is engaged in criminal activity. . . .
>
> This court, however, has specifically rejected the rule requiring specific articulable facts to support an investigatory or detention stop. In State v. Holmberg, 194 Neb. 337, 231 N. W. 2d 672, based upon section 60-435, R. R. S. 1943, this court held that a law enforcement officer when in uniform may stop *any* motorist on the public highways of Nebraska for the purpose of checking his operator's license and vehicle registration without *any* articulable reason to suspect that the motorist has violated *any* law (emphasis added)." 198 Neb. at 18.

If the above interpretation of the Nebraska law permitting a uniformed officer to check compliance with motor vehicle license and registration requirements is allowed to stand, the Fourth Amendment will change at state borders and will be effectively suspended for motorists while on Nebraska's highways.

In effect, the Nebraska Supreme Court acknowledges that, under the Fourth Amendment, a detention stop requires specific articulable facts justifying a founded suspicion, and acknowledges the lack of such specific articulable facts in this case. However, the Nebraska court concludes that the protection of the Fourth Amendment is nullified by the enactment of a statute which that court interprets as permitting discretionary and random license check stops without the need of any articulable reason to suspect violation of any law. *State v. Holmberg,* 194 Neb. 337, 231 N. W. 2d 672 (1975). This conclusion does not follow. If it did, the result would be that literally every police stop of a vehicle would be justified, in practice unreviewable by any court.

Although the court in *Holmberg, id.,* says that it is not sanctioning the use of the statute as mere pretext for stops based on other, inarticulate, reasons, or those made on the statistical chance that some discovery of a law violation will unearth itself, the result of its holding would be to place the impossible burden on Nebraska courts of attempting to ascertain the "real" reason for a stop.

The Nebraska statute has been reviewed in part by a Federal court. *United States v. Bell,* 383 F. Supp. 1298 (D. Neb. 1974). The court said that it is intolerable and unreasonable to authorize selective stops by police through such statutes and that Neb. Rev. Stat. § 60-435 (1943) must be construed narrowly, that such stops must be based on reasonably founded suspicion that either the license of the driver or the registration of the vehicle was improper.

> The balance of the investigatory and routine procedures of the police in juxtaposition with the right of privacy in this case under the circumstances is tilted heavily in favor of the latter. Police activity denominated as "routine police procedure" is not, nor can it be, exempt from the restrictions imposed by the Fourth Amendment. United States v. Nicholas, 448 F. 2d 622, 625 (8th Cir. 1971). *Id.* at 1301.

See also Commonwealth v. Swanger, 453 Pa. 107, 307 A. 2d 875 (1973), *Carroll v. United States,* 262 U. S. 132 (1925).

The statute and its implications are discussed at length in the series of opinions in *Holmberg, supra.* The state judgment in that case was appealed in a *habeas corpus* action to the United States District Court for the District of Nebraska, overturned, and subsequently reversed once more by the Eighth Circuit as a

result of the intervening rule of *Stone v. Powell,* 96 S. Ct. 3037 (1976).

Judge McCown, in his able dissent to the majority opinion in *Holmberg, supra,* disagrees with the majority about the significance of footnote 8 to this Court's opinion in *United States v. Brignoni-Ponce,* 422 U. S. 873 (1975) (Appendix A, *infra,* p. 11). He does not imply that checks for compliance with driver's license and vehicles registration laws may not be carried out, but suggests that this Court meant that such checks could be made without altering traditional requirements safeguarding fourth amendment rights. Such checks could be made 1) by fixed point stops or 2) single vehicle stops where there was reasonable suspicion that relevant laws had been violated.

The federal district court opinion, *Holmberg v. Parratt,* ___ F. Supp. ___, (D. Neb. 1976) (Appendix B, *infra,* p. 45) points out that if the Nebraska court's interpretation of the statute stands, similar arguments could be made about ensuring compliance with other state statutes through violation of federal constitutional rights.

The dissent in the Eight Circuit, opinion, *Holmberg v. Parratt,* ___ F. 2d ___ (C.A. 8, February 1, 1977) (Appendix B, *infra,* p. 45) explains:

> The real issue here is whether the State of Nebraska constitutionally may apply its statute so as to give highway patrolmen *carte blanche* authority to detain highway travellers at random. *Id.* at 146.

And, pointing to similar problems in other states:

> . . . given these court interpretations, the fourth amendment rights of travellers change as they cross state borders. Clearly, some final resolution of this issue should be reached. *Id.* at 147.

Because of the holding in *Stone v. Powell, supra,* the Nebraska court's interpretation of the statute in question, even though critically attacked and overruled once, determines current Nebraska law, and, unless this Court grants the writ of certiorari, important constitutional issues will remain unsettled.

This Court in *Stone v. Powell, supra,* emphasized the need to exercise supervisory jurisdiction, by certiorari, to prevent inconsistent and irrational state court decisions that would make the meaning of the Fourth Amendment change at state borders. The present case is a classic example of the need for this court to exercise such jurisdiction so as to ensure consistent meaning for the Fourth Amendment.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

PATRICK W. HEALEY
W. D. BENSON, JR.
Counsel for Petitioners.

APPENDIX A

STATE OF NEBRASKA, APPELLEE, V. JAMES W. BENSON, APPELLANT.

— N. W. 2d —

Filed March 16, 1977. No. 40764.

1. Criminal Law: Searches and Seizures: Stop and Check: Probable Cause: Motor Vehicles. A reasonably founded suspicion to stop a vehicle cannot be based solely on the receipt by the stopping officer of a radio dispatch to stop the described vehicle without any proof of the factual foundation for the relayed message.

2. Criminal Law: Searches and Seizures: Police Officers and Sheriffs: Stop and Check: Probable Cause: Statutes. Under section 60-435, R. R. S. 1943, a law enforcement officer when in uniform may stop a motorist for the purpose of checking his operator's license and vehicle registration without any articulable reason to suspect that the motorist has violated any law.

3. Criminal Law: Searches and Seizures: Probable Cause: Police Officers and Sheriffs: Motor Vehicles. Testimony that an officer smelled a strong odor or marijuana is sufficient to furnish probable cause to search a vehicle without a warrant, at least where there is sufficient foundation as to the expertise of the officer.

Appeal from the District Court for Lancaster County: Samuel Van Pelt, Judge. Affirmed.

Patrick W. Healey of Healey, Healey, Brown & Wieland, for appellant.

Paul L. Douglas, Attorney General, and Jerold V. Fennell, for appellee.

Heard before White, C. J., Spencer, Boslaugh, McCown, Newton, Clinton, and Brodkey, JJ.

Per Curiam.

Defendant was charged on four felony counts: Possession of marijuana; possession of amphetamines; possession of codeine; and carrying a concealed weapon. A motion to suppress evidence on each count was filed based on a claim of unlawful detention and search and seizure of defendant's motor vehicle. The District Court denied the motion after an evidentiary hearing. The motion to suppress was renewed and overruled at the trial, which was had to the court without a jury. Defendant was found guilty on all four counts and sentenced to probation for a period of 2 years and fined a total of $550 on the four counts.

At approximately 5:30 p.m., on October 16, 1974, Officer Hogue of the Nebraska State Patrol was proceeding south on U. S. Highway No. 77, some 7 or 8 miles south of Wahoo, Nebraska. He heard a radio broadcast from the sheriff's office in Wahoo requesting officers to watch for a white or cream-colored Volkswagen van bearing California license plates and pulling an orange and silver U-Haul trailer. The van was reported possibly southbound on Highway No. 77 or westbound on State Highway No. 92. Officer Hogue proceeded south on Highway No. 77 to Interstate 80 and west on Interstate 80. At about 6 p.m., Officer Hogue saw a white or cream-colored Volkswagen van pulling a U-Haul trailer proceeding westbound on Interstate 80 ahead of him. He called the state patrol and requested that it check with the sheriff's office in Wahoo to determine whether any warrants had been issued for the occupants or any contents and what action was desired. At about 6:05 p.m., he was advised that there were no warrants issued for the subjects of the vehicle but the sheriff's office wanted the vehicle stopped and checked for a possible involvement in the theft of some antique furniture. Officer Hogue then passed the van and noticed that the front of the van had a California license plate but that it had no renewal sticker for 1974. He then called for assistance. Officer Lundy, a plain-clothes investigator with the drug division of the state patrol, was close behind Hogue and responded. When Lundy caught up, the officers stopped the van. Two occupants of the van got out. The officers identified themselves and Hogue proceeded to check the driver's license and vehicle registration and inquire about the absence of a current sticker on the front license plate. Meanwhile, Lundy walked around the van and trailer in order to check the license plates. When he approached the rear of the trailer he smelled a strong odor of marijuana. He returned to Hogue and the occupants of the van and asked defendant for permission to look in the trailer. Defendant said he didn't know the combination of the lock. Lundy then advised the defendant that he believed that there was marijuana in the trailer and advised defendant that he would proceed to call the county attorney to obtain a search warrant. Lundy left the scene for that purpose at about 6:15 p.m., and as he was leaving two other state patrolmen arrived at the scene. The two additional officers made a further inspection of the back of the trailer and found marijuana seeds, stems, and a leaf on a ledge under the back doors of the trailer. The officers then ran a car key under the ledge of the door to obtain a sample of the loose material there. Meanwhile Lundy

had called the county attorney's office and was informed that no search warrant was needed and he therefore returned to the scene. Hogue then arrested the defendant and his companion and read the Miranda warnings to them. They were frisked and the van was searched. Amphetamines were found in the defendant's shirt pocket and a gun was found in a box by the front seat of the van. The van and the trailer were towed into Lincoln and the trailer was broken into and searched. The search disclosed 119 pounds of marijuana and some codeine tablets.

The defendant contends that the dentention of a citizen is constitutionally justified only upon the existence of specific articulable facts justifying such detention, and that arrest is justified only upon probable cause. The argument is that the radio broadcast had no factual foundation and that the stop of defendant's vehicle was, therefore, illegal, and the evidence should be suppressed. At the evidentiary hearing on the motion to suppress there was no evidence as to any information or facts which were relied on as the factual foundation for the broadcast message. The foundation for the broadcast message, if any, could have been supplied by an officer or officers whose observations and information generated the suspicion. The radio message to Officer Hogue standing alone does not prove the existence of reasonably founded suspicion. An apparently valid directive from one officer to another to stop a person on a vehicle insulates the complying officer from assuming personal responsibility and liability for his act done in obedience to the direction. But the radio message standing alone does not furnish legal cause for the detention any more than the fact of detention supplies its own justification. If it did, the complete absence of any valid grounds for a stop could

become valid grounds by the issuance of a radio directive to make the stop. A radio message alone would thus instantly transform an illegal arrest or detention into a legal one. If this case rested solely upon the foundation of the radio message to Officer Hogue with no evidence or proof that a factual foundation for the message existed the legality of the detention here could not be supported. A reasonably founded suspicion to stop a vehicle cannot be based soley on the receipt by the stopping officer of a radio dispatch to stop the described vehicle without any proof of the factual foundation for the relayed message. Whiteley v. Warden, 401 U. S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971); United States v. Robinson, 536 F. 2d 1298 (9th Cir., 1976); Barton v. State, 328 So. 2nd 353 (Miss., 1976).

The general rule is that a detention stop violates the Fourth Amendment unless specific articulable facts taken together with rational inferences from those facts reasonably warranted a founded suspicion that a person is engaged in criminal activity. United States v. Brignoni-Ponce, 422 U. S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607; United States v. Mallides, 473 F. 2d 859 (9th Cir., 1973); Brewer v. Wolff, Jr. 529 F. 2d 787 (8th Cir., 1976); Commonwealth v. Swanger, 453 Pa. 107, 307 A. 2d 875 (1973).

This court, however, has specifically rejected the rule requiring specific articulable facts to support an investigatory or detention stop. In State v. Holmberg, 194 Neb. 337, 231 N. W. 2d 672, based upon section 60-435, R. R. S. 1943, this court held that a law enforcement officer when in uniform may stop any motorist on the public highways of Nebraska for the purpose of checking his operator's license and vehicle registration without any articulable reason to suspect that the motorist has violated any law.

There was, therefore, authority for the stop of defendant's vehicle aside from the radio direction. While Officer Hogue was checking the license and registration, Officer Lundy examined the trailer and smelled marijuana. Officer Lundy was an investigator with the drug division of the state patrol with ample expertise in the field and the ability to identify marijuana by smell. The great majority of courts which have currently passed upon the issue have held that the smell of marijuana was alone sufficient to furnish probable cause to search a vehicle without a warrant at least where there is sufficient foundation as to expertise. See, State v. Wood, 195 Neb. 353, 238 N. W. 2d 226; United States v. Soloman, 528 F. 2d 88 (9th Cir., 1975); People v. Cook, 13 Cal. 3d 663, 119 Cal. Rptr. 500, 532 P. 2d 148 (1975); Gordon v. State, 259 Ark. 134, 529 S. W. 2d 330 (1976); United States v. Garza, 539 F. 2d 381 (5th Cir., 1976); United States v. Bowman, 487 F. 2d 1229 (10th Cir., 1973); State v. Bidegain, 88 N. M. 384, 540 P. 2d 864 (1975).

Under current Nebraska law the detention stop here was valid, the officers had a right to be where they were, and when Officer Lundy smelled marijuana there was probable cause for the arrest and search. The judgment is affirmed.

AFFIRMED.

McCown, J., dissenting.

For the reasons set forth in my dissent in State v. Holmberg, 194 Neb. 337, 231 N. W. 2d 672, I am convinced that the Holmberg case should be overruled.

In order to adequately represent Judge Mc'Cown's dissent, the opinion of the *Holmberg* case is set out below.

194 Neb. 337
STATE of Nebraska, Appellee,
vs.
Gary M. HOLMBERG, Appellant.
No. 39930.
Supreme Court of Nebraska.
July 17, 1975.

Defendant was convicted in the District Court, Keith County, Windrum, J., of possession of marijuana with intent to distribute, deliver, or dispense, of possession of amphetamines, and of possession of cocaine, and he appealed. The Supreme Court, Spencer, J., held that search at scene after state trooper stopped camper, which uncovered marijuana, and later at station, which uncovered amphetamines and cocaine, did not have to be suppressed on grounds that the initial stop to check operator's license and vehicle registration constituted an unreasonable seizure under the Fourth Amendment since the stop was lawful under statute, and where officer had probable cause to search for marijuana when, subsequent to stop, trooper became aware of the presence of marijuana.

Affirmed.

McCown, J., dissented and filed opinion.

1. Automobiles (Key) 349

Statute providing, inter alia, that members of state patrol have power, when in uniform, to require driver to stop and exhibit his operator's license and registration card issued for the vehicle, the registration plates, and registration card thereon, was intended to give officers mentioned therein the power to enforce laws

regulating the operation of vehicles or the use of the highway. R. R. S. 1943, § 60-435.

2. Automobiles (Key) 349

Automobiie licensing laws, including statute which, interalia, gives members of state patrol power, when in uniform, to require driver to stop and exhibit his operators license and registration card issued for the vehicle and to submit to an inspection of such vehicle the registration plates and registration car thereon, are safety measures applicable to the use of all roads or highways within the state. R. R. S. 1943, § 60-435.

3. Automobiles (Key) 349

Only practical method of enforcing the automobile licensing laws, including statute providing that all members of state patrol have power, when in uniform, to require driver to stop and exhibit his operator's license and registration card issued for the vehicle and submit to an inspection of such vehicle, the registration plates and registration card thereon, is by stopping the vehicle, and any inconvenience experienced by an individual motorist is relatively slight compared to the benefits to be derived from strict enforcement of the licensing laws. R. R. S. 1943, § 60-435.

4. Automobiles (Key) 349

Due regard for practical necessities of effective driver and vehicle licensing enforcement requires a brief stop or detention for checking purposes; it is matter of balancing between the governmental interest in the safety of users of the highways and the individual's right to freedom and privacy, and such momen-

tary stopping for such purpose does not violate constitutional rights.

5. Automobiles (Key) 349

A routine automobile license check, and its concomitant and temporary delay of a driver, does not constitute an "arrest" in any legal sense where there is no arbitrary conduct or harassment on part of officer.

See publication Words and Phrases for other judicial constructions and definitions.

6. Searches and Seizures (Key) 7(10)

If facts disclose that stop of a motorist by an officer is a mere pretext for other reasons, such would be arbitrary, unreasonable and violative of the Fourth Amendment. U.S.C.A. Const. Amend. 4.

7. Searches and Seizures (Key) 3.3(6)

Spot check of an automobile is not to be used as a pretext to search for evidence of some possible crime unrelated to requirements of statute providing, inter alia, that members of state patrol shall have power, when in uniform, to require driver of an automobile to stop and exhibit his operator's license and registration card issued for the vehicle and to submit to an inspection of such vehicle, the registration plates and registration card thereon.

8. Automobiles (Key) 349

When driver who has been stopped by officer for spot check of his license and registration has produced his licenses, and they are in proper form, he must be al-

lowed promptly to continue on his way, and it is only when officer becomes aware of a reasonable probability of a law violation that driver may be detained for further questioning.

9. Searches and Seizures (Key) 7(10, 20)

Search at scene after state trooper stopped camper, which uncovered marijuana, and later at station, which uncovered amphetamines and cocaine, did not have to be suppressed on grounds that initial stop to check operator's license and vehicle registration constituted an "unreasonable seizure" under the Fourth Amendment, since the stop was lawful under statute permitting state patrolman, where in uniform, to require driver to stop and exhibit operator's license and registration card issued for vehicle and to submit to inspection of such vehicle, and where officer had probable cause to search for marijuana without necessity of relying on consent when, subsequent to the stop, trooper became aware of the presence of marijuana by use of his senses. R. R. S. 1943, § 60-435; U.S.C.A. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

Syllabus by the Court

1. Section 60-435, R. R. S. 1943, is intended to give the officers mentioned therein the power to enforce laws regulating the operation of vehicles or the use of the highway. The licensing laws are safety measures applicable to the use of all roads or highways within the state.

2. The only practical method of enforcing the licens-

ing laws involved in section 60-435, R. R. S. 1943, is by stopping the vehicle. The inconvenience experienced by the individual motorist is relatively slight compared to the benefits to be derived from strict enforcement of the licensing laws.

3. Due regard for the practical necessities of effective driver and vehicular licensing enforcement requires a brief stop or detention for checking purposes. It is a matter of balancing between the governmental interest in the safety of users of the highways and the individual's right to freedom and privacy. The momentary stopping of a citizen for this purpose does not violate constitutional rights.

4. A routine license check and its concomitant temporary delay of a driver does not constitute an arrest in a legal sense where there is nothing arbitrary or harassing present.

5. When the driver has produced his licenses and they are in proper form, he must be promptly allowed to continue on his way. It is only when the officer becomes aware of a reasonable probability of a law violation that the driver may be detained for further questioning.

John O. Sennett, McGinley, Lane, Mueller, Shanahan, McQuillan & Gale, Ogallala, for appellant.

Paul L. Douglas, Atty. Gen., C. C. Sheldon, Asst. Atty Gen., Lincoln, for appellee.

Heard before White, C.J., and Spencer, Boslaugh, McCown, Newton, Clinton and Brodkey, JJ.

Spencer, Justice.

Defendant appeals his convictions for possession of marijuana with the intent to distribute, deliver, or dispense; for the possession of amphetamines; and for the possession of cocaine. While the defendant sets out five assignments of error, they may be categorized as embraced within the ambit of the overruling of defendant's motion to suppress for an alleged unreasonable search and seizure. The issue in this case was previously decided adverse to the defendant in an opinion by a single member of this court. We affirm.

Defendant was operating a motor vehicle, a camper on a pickup, in the early morning hours of Saturday, November 24, 1973. He was proceeding in an easterly direction on Interstate 80 in Keith County, Nebraska. Trooper Hollis Compton of the Nebraska Safety Patrol, while in his official uniform, stopped defendant's vehicle for the purpose of checking his operator's license, the vehicle registration, and the vehicle identification number. There was no other reason for the stop. Reliance to make the stop is based solely upon section 60-435, R. R. S. 1943, which provides in part as follows: "* * * all members of the Nebraska State Patrol * * * shall have the power * * * (4) when in uniform, to require the driver thereof to stop and exhibit his operator's license and registration card issued for the vehicle and submit to an inspection of such vehicle, the registration plates and registration card[s] thereon * * *."

While checking the license and registration, the officer smelled a distinctive marijuana odor and observed what he believed to be marijuana seeds on the floor of the vehicle. Incense was burning in the vehicle. He asked the defendant if he had any marijuana and the

defendant said "No." Defendant then told the officer he had been smoking his last marijuana cigarette. The trooper asked permission to look into the camper. The defendant gave consent, obtained the key, and unlocked the camper. When the door was opened there was a very strong odor which the trooper associated with the smell of raw marijuana. In inspecting the camper, he noticed the floor had built-up sides and that there was a box on the side. The built-up portion on the sides of the box contained some screws. The trooper asked defendant what the sides contained and defendant said all he knew was insulation. The trooper asked defendant if he could look in those portions of the box. Defendant did not reply. The trooper obtained a screwdriver and while the defendant held the trooper's flashlight the trooper unscrewed the screws on the box. When the trooper pulled the sides open, he could seen green plastic bags. Each bag was approximately 2 and ½ inches thick, approximately 6 to 8 inches wide, and approximately 14 to 16 inches long. There were 42 packages of marijuana in the green bags; each weighed 2 pounds apiece, for a total weight of 84 pounds. When the trooper saw the green bags, he placed defendant under arrest and read him the Miranda warnings. He then took defendant into Ogallala where he conducted a strip search and put defendant in jail. The strip search disclosed a substance containing dielamphetamine and substances containing cocaine.

The next day, Sunday, a specialized criminal investigator for the Patrol visited with the defendant. After the defendant signed a "right's waiver" form the investigator questioned him. Defendant told this investigator he did not have a prescription for the amphetamines. He had obtained them from a girl who did, and had obtained them for the purpose of staying awake on

the trip. Defendant said the white powder in the yellow plastic vial found in his possession was an amphetamine he had been "snorting." He also admitted that the cigarette and the other marijuana had been in his possession.

The problem presented is whether or not the evidence obtained by the search at the scene and later at the station should be suppresed because the initial stop to check the operator's license and vehicle registration constituted an unreasonable seizure within the ambit of the Fourth Amendment. We hold it should not. The stop made was a lawful one under section 60-435, R. R. S. 1943.

It is defendant's contention that even the momentary stopping of a motorist for an inspection constitutes an arrest and requires probable cause. He argues his freedom of movement should be immune from state interference unless there is some indication of a law violation. What we said in State v. Carpenter (1967), 181 Neb. 639, 150 N. W. 2d 129, is pertinent herein: "Defendant is laboring under the misapprehension that the same rule on probable cause applies when a person is merely stopped and questioned as when he is arrested. Defendant's approach presents a clash of interest between the protection of the public and right of an individual. His premise is false and would cripple law enforcement. * * * Individual rights on occasion must give way to the rights of society. This is the very purpose of law — to restrict the rights of the individual to provide protection for society."

[1, 2] Defendant argues that section 60-435, R. R. S. 1943, would be unconstitutional unless we can read into it a requirement of some reasonable cause otherwise for stopping a motor vehicle. We do not construe the

statute that narrowly. This statute is intended to give the officers mentioned therein the power to enforce laws regulating the operation of vehicles or the use of the highways. The licensing laws are safety measures applicable to the use of all roads or highways within the state. It would be most unusual to have an observable indication of a licensing violation of a moving vehicle. Stopping the vehicles for inspection is the only practical method of enforcement of section 60-435, R. R. S. 1943.

Defendant is relying on Commonwealth v. Swanger, a 1973 Pennsylvania case, 220 Pa. Super. 720, 300 A. 2d 66, rehearing at 453 Pa. 107, 307 A. 2d 875, which held an investigatory stop was unreasonable and arbitrary. It held the Pennsylvania statute constitutional, but determined that the officer only had authority to stop a vehicle to check a registration and license when he had probable cause based on specific facts which indicated to him either the vehicle or the driver was in violation of the code. To so hold would emasculate the intent and purpose of the statute.

There are cases in some jurisdictions which hold that because of the number of automobiles on the highways and their extensive use by our population, any stop to spot-check license and registration is manifestly unjust and unfair unless all automobiles using the highways at that place and time are likewise checked. While the record herein would indicate that the defendant and the trooper were apparently the only two persons using the highway at that early hour of the morning, we do not accept the rationale of these cases. We are in agreement with the many decisions in other jurisdictions which hold otherwise.

[3, 4] The only practical method of enforcing the licensing laws involved is by stopping the vehicle. The inconvenience experienced by the individual motorist is relatively slight compared to the benefits to be derived from strict enforcement of our licensing laws. Whether this should be accomplished by spot checks or road blocks is a question that has been raised. Certainly there is less inconvenience to the motoring public by using spot checks. Spot checks also have the advantage of always being unexpectedly possible. We believe occasional spot checks are not only more practical but can have a salutary effect in the enforcement of our traffic laws and serve to promote the safety of the traveling public. Excessive spot checks can be unduly burdensome to traffic and commerce. The line of demarcation between the two is not easily drawn. However, due regard for the practical necessities of effective driver and vehicle licensing enforcement requires a brief stop or detention for checking purposes. It is a matter of balancing between the governmental interest in the safety of users of the highways and the individual's right to freedom and privacy.

The District of Columbia Court of Appeals in Palmore v. United States (1972), 290 A. 2d 573, upheld procedure similar to that followed in this instance. Two District of Columbia officers in an unmarked car, recognizing that the car the defendant was driving was a rental car, decided to run a spot check to determine if the defendant had a proper license and a rental agreement (equivalent of proper registration). Defendant had committed no traffic offense and his auto had no apparent equipment defect. The stop was solely to check the operator's license and the vehicle registration. During the stop, one of the officers noted the presence of a trigger mechanism of a pistol protruding out from beneath the arm rest on the front seat of de-

fendant's car. He removed the pistol and after learning it was unregistered, placed the defendant under arrest. The narrow issue posed in that case was whether the officers could stop the defendant and demand his license and registration when they had not seen defendant violate a traffic or vehicular equipment regulation and had no cause to believe that he was about to engage in any criminal activity. The government argued that the right to stop was a duty mandated by Congress. The officers had a right to require the driver to produce his license and vehicle registration without the need of first having reasonable suspicion that the driver lacked those particular documents. The following from that case is pertinent herein: "At the outset, we reject the rigid rule which appellant urges us to adopt: That a police officer may stop an automobile for a spot check of the driver's license and car registration only when he has articulable suspicion as defined by Terry, that either of such documents is invalid. The touchstone of the fourth amendment is reasonableness. It seems to us in this age of the motor car that when the community's interest in limiting use of its highways to licensed drivers in registered autos is balanced against the momentary interruption of the motorist which is necessary to ascertain whether he is complying with these licensing requirements such intrusion is not so unreasonable as to be violative of the fourth amendment.

"We must keep in mind that if we were to limit the police as appellant urges, to stopping only those autos in which the driver might reasonably be suspected to be without a license, for example, because of his youthful appearance, the results would unjustifiably single out and discriminate against certain groups of citizens, i. e., the young. Moreover, such a restrictive

ruling by us might render virtually unenforceable the Congressional prohibition against all unlicensed drivers and unregistered cars driving on District of Columbia streets. After all, persons who drive in the District without a valid license and registration will not necessarily exhibit conduct or the appearance giving rise to articulable suspicion that they are without proper driving credentials. Thus, they would be immune from the 'spot check' to enforce a requirement deemed necessary by Congress for public safety on the District's highways."

The Court of Criminal Appeals of Texas, in Leonard v. State (1973), 496 S. W. 2d 576, held to the same effect. There, an officer stopped a station wagon for the purpose of making a driver's license check. "The officer asked to see Leonard's 'driver's license.' Leonard said he did not have one, but offered other identification. The officer, when asked if he noticed anything about Leonard's appearance, replied: 'Yes, sir; from an odor from his clothing, it was a marihuana smell.' The officer then testified: 'I proceeded over to the vehicle that I had stopped and I stuck my head into — to look at the passenger and ask him for identification. That is when I smelled the real strong odor of marihuana * * *.' "

The Texas court held the officer was authorized to stop Leonard's vehicle by virtue of the statute to determine whether the driver had a valid license to operate the vehicle. It held the State had a legitimate interest to determine the fitness of a vehicle to be used and its driver to operate such vehicle on a public road. The court said: "The momentary stopping of a citizen for this purpose does not violate constitutional rights. See Myricks v. United States, [370 F. 2d 901 (5th Cir.,

1967)]." Quoting further from Leonard v. State, supra, the court said: "Similar statutory provisions have been construed by many courts in the same manner as Article 6687b, Sec. 13, V.A.T.C.S. has been construed by this court. See, e.g., United States v. Lepinski, 460 F. 2d 234 (10th Cir. 1972); United States v. Croft, 429 F. 2d 884 (10th Cir. 1970); Lipton v. United States, 348 F. 2d 591 (9th Cir. 1965); United States v. Ware, 457 F. 2d 828 (7th Cir. 1972); Palmore v. United States, D.C.App., 290 A. 2d 573 (1972); and State v. Garcia, 16 N.C.App. 344, 192 S. E. 2d 2 (1972)."

In United States v. Turner (8th Cir., 1971), 442 F. 2d 1146, Judge Lay wrote: "The police officer clearly had probable cause to arrest the defendant for failure to have a proper driver's license under Missouri law. It is argued, however, that the officer's motive in stopping defendant's car was not to check his driver's license, but merely to pursue his suspicion of some other crime. Thus, it is contended that the officer wanted to make an unwarranted search for evidence of some unidentified crime. We do not find it unreasonable for an officer to inquire as to a driver's license under these circumstances. It is conceded under the state law of Missouri that an officer has a right to stop an automobile to make a routine check for an operator's license. See Jackson v. United States, 408 F. 2d 1165, 1168 (8 Cir. 1969); Rodgers v. United States, 362 F. 2d 358, 362 (8 Cir. 1966). Cf. Terry v. Ohio, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); Carpenter v. Sigler, 419 F. 2d 169 (8 Cir. 1969)."

In Rodgers v. United States (8th Cir., 1966), 362 F. 2d 358, in an opinion by Mr. Justice Blackmun, then a member of the Eighth Circuit, the court held a routine license check and its concomitant temporary delay of a driver does not constitute an arrest in a legal sense

where there is nothing arbitrary or harassing present. Three Missouri patrol officers had received a radio broadcast on a number of stolen vehicles, including a white Buick convertible. When the defendant passed one of the officers he was violating no traffic regulation but the officer noticed he was driving a white Buick convertible similar to the car previously reported stolen. The trooper stopped the car and asked to see the driver's license of defendant. The defendant replied he did not have it with him, that he had left it in St. Louis. The trooper then detained the defendant and subsequently learned that the car had been stolen.

In Lipton v. United States (9th Cir., 1965), 348 F. 2d 591, the Ninth Circuit held if stopping a motorist for the sole purpose of inquiring whether he held a California license was in any sense a seizure, it was not an unreasonable one and did not violate any right given the motorist by the Fourth Amendment to the federal Constitution.

In Myricks v. United States (5th Cir., 1967), 370 F. 2d 901, appellant Myricks was stopped for a routine driver's license check and had none. It subsequently developed the car was stolen. The Fifth Circuit, in an opinion by Circuit Judge Brown, there said: "The Constitution is, it is often said, a living document. If it lives, it must take account of the dominant symbol of today's dynamic society. It must recognize, therefore, that Texas has a legitimate interest in the roadworthiness of automobiles which transport, but which can maim and kill. Cf. Ford Motor Co. v. Mathis, 5 Cir., 1963, 322 F. 2d 267, 3 A.L.R. 3d 1002. This comprehends both technical fitness of the driver and the mechanical fitness of the machine. After the event it is always too late. The State can practice preventative therapy by

reasonable road checks to ascertain whether man and machine meet the legislative determination of fitness. That this requires a momentary stopping of the traveling citizen is not fatal. Nor is it because the inspection may produce the irrefutable proof that the law has just been violated. The purpose of the check is to determine the present, not the past: is the car, is the driver now fit for further driving? In the accomodation of society's needs to the basic right of citizens to be free from disruption of unrestricted travel by police officers stopping cars in the hopes of uncovering the evidence of non-traffic crimes, cf. Brinegar v. United States, 1949, 338 U. S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879; Clay v. United States, 5 Cir., 1956, 239 F. 2d 196; Clay v. United States, 5 Cir., 1957, 246 F. 2d 298, cert. denied, 355 U. S. 863, 78 S. Ct. 96, 2 L. Ed. 2d 69; Rios v. United States, 1960, 364 U. S. 353, 80 S. Ct. 1431, 4 L. Ed. 2d 1688, the stopping for road checks is reasonable and therefore acceptable. Likewise, an arrest is proper if the check reveals a current violation which by its nature must have been taking place in the immediate past. State and Federal Courts, including this one, have uniformly sustained such checks and arrests when not done as a subterfuge or ruse."

[5-8] We are not unmindful of the possibility of abuse of the statute as we interpret it. We have no hesitancy in saying that if the facts should disclose that the stop is a mere pretext for other reasons, it would be held to be arbitrary and unreasonable and violative of the Fourth Amendment. We hasten to state, specifically and emphatically, that a spot check is not to be used as a pretext to search for evidence of some possible crime unrelated to the requirements of section 60-435, R. R. S. 1943. We hold further that when the driver has produced his licenses and they are in proper form, he must be promptly allowed to continue on his way.

It is only when, as here, the officer becomes aware of a reasonable probability of a law violation that the driver may be detained for further questioning.

[9] As the trial court found, the only reason for the stop was to check the operator's license of the defendant, the motor vehicle registration, and its identification number. This is permissible under our law. No constitutional violation was involved. Subsequent to the stop, by the use of his senses, the trooper became aware of the presence of marijuana. At that time, under our law, he had probable cause to search the camper for marijuana without the necessity of relying on consent, although he had consent in this case. In the search he discovered the marijuana and placed the defendant under arrest. Subsequently, a search at the police station disclosed the presence of amphetamines and cocaine. It would be mere conjecture to speculate on what might have happened if the defendant had continued to "snort" the white powder for the more than 300 miles of further travel across Nebraska.

As suggested by the dissent, this opinion was written prior to the release of United States v. Brignoni-Ponce (1975), ___ U. S. ___, 95 S. Ct. 2574, 45 L. Ed. 2d 607. It has been reaffirmed subsequent to that decision upon the ground that footnote 8 limits that case to Border Patrol agents, and specifically excepts the situation present herein. Footnote 8 is as follows: "Our decision in this case takes into account the special function of the Border Patrol, the importance of the governmental interests in policing the border area, the character of roving-patrol stops, and the availability of alternatives to random stops unsupported by reasonable suspicion. Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether

motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. Our decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding driver's licenses, vehicle registration, truck weights, and similar matters."

We also note that the dissent is in error in suggesting that of the cases cited in this opinion only that of Palmore v. United States, D.C.App., 290 A. 2d 573, on its facts supports the conclusion we reach.

The judgment of the trial court is affirmed.

Affirmed.

McCown, Justice (dissenting).

The majority opinion, on the strength of section 60-435, R. R. S. 1943, now holds that a law enforcement officer, when in uniform, may stop any motorist at random at any time and at any place on the public highways, streets, or roads of the State of Nebraska without any articulable reason to suspect that he has violated any law, but simply for the avowed purpose of checking his operator's license and vehicle registration. That holding emasculates the constitutional protection of the Fourth Amendment guaranties against unreasonable search and seizure and for all practical purposes repeals the Fourth Amendment by statutory fiat. The mere pronouncement of the magic words "I wanted to check the registration and driver's license" becomes the "open sesame" which removes all constitutional barriers to a random investigative stop of any

motor vehicle at any time, any place, at the arbitrary whim of any police officer.

In the case at bar the officer's reason to make the stop was solely to check the operator's license, vehicle registration, and identification number. He had no other reason and there were no facts or circumstances which would justify any reasonable suspicion of the violation of any law. The majority opinion relies upon cases which are cited as holding that a police officer may stop an automobile for a spot check of driver's license and car registration without any articulable suspicion that any law is being violated, or that either of such documents is invalid. Of the cases cited only that of Palmore v. United States, D.C.App., 290 A. 2d 573, on its facts supports such a conclusion. That case rests its holdings that such a seizure is reasonable on the ground that the community has an interest in limiting the use of its highways to licensed drivers in registered automobiles. The community has an even greater interest in protecting itself against far more serious crimes but such a justification has not previously been sufficient to override the mandates of the Fourth Amendment.

On the other hand, many more cases, indirectly referred to in the majority opinion, have held such an investigatory stop to be unreasonable and arbitrary when there is no articulable reason to suspect a violation of any law. Such cases are not only more numerous, but far more persuasive. See, for example, Commonwealth v. Swanger, 453 P. 107, 307 A. 2d 875 (1973). In that case a statute also granted the right to stop a vehicle for the purpose of inspection in even broader terms than the Nebraska statute. The Pennsylvania court specifically held that the right of an individual to be free from government intrusions without

apparent reason outweighed the interest of the public in insuring safety on the highways. The Pennsylvania court said: "The crux of our decision that a stop of a single vehicle is unreasonable where there is no outward sign the vehicle or the operator are in violation of the Motor Vehicle Code, goes to the Commonwealth's argument the police need no justification to stop the vehicle. We rule before the government may single out one automobile to stop, there must be specific facts justifying this intrusion. To hold otherwise would be to give the police absolute, unreviewable discretion and authority to intrude into an individual's life for no cause whatsoever."

The Nebraska statute itself has been previously interpreted by the United States District Court for Nebraska to mean that there must be some founded grounds which draw or attract the attention of an officer to a possible violation of law. See United States v. Bell, 383 F. Supp. 1298 (D.C. Neb., 1974). Although the United States court in that case deferred from ruling on the constitutionality of section 60-435, R. R. S. 1943, pending a determination of the issue by this court en banc, the court did say: "This Court, in considering future cases, will narrowly construe such a statute to the extent that there must be a founded and reasonable suspicion drawing an officer's attention in order for him to pursue a selective stop which infringes, intrudes, or molests an individual's expectation of privacy guaranteed under the Fourth Amendment." The United States District Court also said: "It is intolerable and unreasonable to allow or authorize a police officer to stop any vehicle on a pretext or in a selective manner through the utilization of a state driver's license statute or motor vehicle registration or safety statute, on the chance that such officer might perceive

illegal activity; such an inconvenience and indignity is not outweighed by an overriding governmental interest." It should be noted here that that case involved the same Officer Compton who is involved in this case.

No matter what views may be held on the subject of whether or not a motorist can be stopped at random for investigation of his driver's license and registration without any reason to suspect that he has violated any law, the issue was foreclosed by the United States Supreme Court on June 30, 1975, in the case of United States v. Brignoni-Ponce (1975), ____ U. S. ____, 95 S. Ct. 2574, 45 L. Ed. 2d 607, Syllabus (b) of that case specifically holds: "To allow roving patrols the broad and unlimited discretion urged by the Government to stop all vehicles in the border area without any reason to suspect that they have violated any law, would not be 'reasonable' under the Fourth Amendment."

That case involved a roving patrol stop of an automobile by the border patrol to question the occupants about their citizenship and immigration status. The stop was at a point approximately 65 miles north of the Mexican border. The only reason for stopping the automobile was that its three occupants appeared to be of Mexican descent. The stopping of cars without warrants in the particular area was authorized under federal statutes and current regulations of the border patrol. The United States Supreme Court reaffirmed the principle that no act of Congress can authorize a violation of the Constitution, and that an investigative stop that involves only a brief detention short of traditional arrest constitutes a seizure which must be "reasonable." "As with other categories of police action subject to Fourth Amendment constraints, the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers."

The Supreme Court held that because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop and the absence of practical alternatives for policing the border, that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke the suspicion. The court specifically reiterated that the stop and inquiry must be "reasonably related in scope to the justification for their initiation."

It seems patently clear that the thrust of the Supreme Court opinion is directed at random stops of a single vehicle which are made without any reason to suspect that the motorist has violated any law. The court said: "To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. * * Thus, if we approved the Government's position in this case, Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law.

"We are not convinced that the legitimate needs of law enforcement require this degree of interference with lawful traffic."

The majority opinion of this court was written prior to the release of the Brignoni-Ponce case but has been reaffirmed subsequent to that decision upon the ground that footnote 8 in Brignoni-Ponce states: "Our decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding driver's licenses, vehicle registration, truck weights, and similar matters."

It seems only logical that the type of investigative stop referred to in that footnote is a fixed point or check-point stop and not an indiscriminate random stop of a single vehicle without reasonable suspicion. The concurrence of Mr. Justice Rehnquist and the concurrence of Mr. Justice White, with whom Mr. Justice Blackmum joins, confirm that conclusion.

There is simply no logical definitive way to distinguish between the stop of an automobile made for the purpose of determining whether driver's license and vehicular registration laws have been violated, and a stop to determine whether the laws governing entry and transportation of aliens have been violated. If any distinction can be made, it might be said that the governmental interest and the public interest in the enforcement of alien entry laws is greater than interest in the proper registration and licensing of vehicles and drivers.

As the Supreme Court said in Brignoni-Ponce with respect to seizures of the person involving only a brief detention short of traditional arrest, "the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law

officers." It seems transparently clear that an indiscriminate random stop of a single motor vehicle without any ground for reasonable suspicion of any law violation, which can be made at the whim of any law officer, is an arbitrary interference with an individual's right to personal security and is unreasonable within the ambit of the Fourth Amendment. The initial seizure here being unconstitutional, the motion to suppress should have been granted.

SUPREME COURT OF NEBRASKA
JANUARY TERM, A.D. 1977

STATE OF NEBRASKA,

Appellee,

vs.

JAMES W. BENSON,

Appellant.

APPEAL FROM THE DISTRICT COURT FOR LANCASTER COUNTY.
No. 40764.

This cause coming on to be heard upon appeal from the District Court of Lancaster County, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and it hereby is, affirmed; that appellee recover of and from appellant its costs herein expended, taxed at $134.25; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Per Curiam.

McCown, Judge, dissenting.

SUPREME COURT)
) ss.
STATE OF NEBRASKA)

I, LARRY D. DONELSON, Clerk of the Supreme Court of the State of Nebraska, do certify that I have compared the foregoing copy of journal entry order, in the case of State vs. Benson No. 40764, with the original now on file in my office, and that the same is a correct transcript thereof, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 6th day of June, 1977.

LARRY D. DONELSON
Clerk
By John D. Cariotto
Deputy

(SEAL)

STATE OF NEBRASKA, APPELLEE, V. ONE 1968 VOLKSWAGEN, APPELLANT.

— N. W. 2d —

Filed March 16, 1977, No. 40857.

Motor Vehicles: Searches and Seizures: Controlled Substances: Statutes: Constitutional Law. The seizure and forfeiture of vehicles used for the unlawful transportation of controlled substances, carried out under the provisions of section 28-4,135(4), R. R. S. 1943, does not constitute an unconstitutional taking of property without just compensation or without due process of law.

Appeal from the District Court of Lancaster County, Samueal Van Pelt, Judge. Affirmed.

Healey, Healey, Brown & Wieland, for appellant.

Ronald D. Lahners, Robert R. Gibson, and Stephen K. Yungblut, for appellee.

Heard before White, C. J., Spencer, Boslaugh, McCown, Newton, Clinton and Brodkey, JJ.

McCown, J.

This is a proceeding for forfeiture of a 1968 Volkswagen allegedly used for the unlawful transportation of controlled substances. The District Court entered judgment for condemnation and this appeal followed.

The Vehicle involved in this condemnation proceeding was owned by James W. Benson, the defendant in State v. Benson, ante p. 14, ___ N. W. 2d ___. The facts with respect to the unlawful transportation of controlled substances are set out in that case. Constitutional issues of unlawful detention and search and seizure have been disposed of in State v. Benson, supra, and apply equally here.

The defendant's counsel raises two additional issues in this appeal. He challenges the validity of the condemnation action as a taking of property without just compensation and without due process of law, and contends that the vehicle was not accurately or correctly described in the complaint and order.

The action here was taken under the provisions of section 28-4,135, R. R. S. 1943, which provides in part: "(4) When any * * * vehicle * * * is seized * * * the person seizing the same shall within five days thereafter cause to be filed in the district court of the county in which seizure was made a complaint for condemnation of the vehicle seized. * * * The complaint shall des-

cribe the conveyance, state the name of the owner if known, allege the essential elements of the violation which is claimed to exist, and shall conclude with a prayer of due process to enforce the forfeiture."

The basis for the forfeiture here was the use of the vehicle for the unlawful transportation of controlled substances. The United States Supreme Court, in passing on a very similar statute, has rejected constitutional challenges like those made here and upheld the validity of such a forfeiture statute. In Calero-Toledo v. Pearson Yacht Leasing Co., 416 U. S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974), the court said: "Forfeiture of conveyances that have been used — and may be used again — in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." That case is controlling here. The seizure and forfeiture of vehicles used for the unlawful transportation of controlled substances, carried out under the provisions of section 28-4,135(4), R. R. S. 1943, does not constitute an unconstitutional taking of property without just compensation or without due process of law.

Defendant's counsel also contends that provisions for forfeiture must be strictly construed and that the decree of forfeiture does not accurately and correctly describe the vehicle to be forfeited. The complaint described the vehicle as a 1968 Volkswagen seized by the Nebraska State Patrol near Lincoln on October 16, 1974, and in the custody of the state patrol. The order to the sheriff to seize the vehicle and hold it pending further order of the court described the vehicle as bearing California license YKD 476. The demurrer

and answer of James W. Benson refers to the vehicle as bearing California license number YKD 470. The State's reply also describes the vehicle as bearing license YKD 470. The order for condemnation simply referred to the 1968 Volkswagen vehicle "involved here," and the order was approved as to form by counsel.

The statute requires that the complaint describe the conveyance and state the name of the owner, if known. The only discrepancy in any description involved one order which listed the last digit of the California license as a 6 rather than a 0. That might well have been a typographical error. It would have been preferable to have a more detail description, including body type and color, plus serial or motor numbers, if available. However, we cannot say that the statute requies a more specific description of the vehicle to be forfeited when there is no actual confusion, the vehicle is in custody, and the owner appears and participates in the hearing. Under the circumstances here the description of the vehicle was sufficient to constitute compliance with the requirements of section 28-4,135(4), R. R. S. 1943.

The judgment is affirmed.

AFFIRMED.

SUPREME COURT OF NEBRASKA
JANUARY TERM, A.D. 1977

STATE OF NEBRASKA,

Appellee,

vs.

ONE 1968 VOLKSWAGEN,

Appellant.

APPEAL FROM THE DISTRICT COURT FOR LANCASTER COUNTY.
No. 40857.

This cause coming on to be heard upon appeal from the District Court of Lancaster County, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and it hereby is, affirmed; that appellee recover of and from appellant its costs herein expended, taxed at $20.00; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion by McCown, Judge.

SUPREME COURT)
) ss.
STATE OF NEBRASKA)

I, LARRY D. DONELSON, Clerk of the Supreme Court of the State of Nebraska, do certify that I have compared the foregoing copy of journal entry order, in the case of State vs. One 1968 Volkswagen No. 40857, with the original now on file in my office, and that the same is a correct transcript thereof, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 6th day of June, 1977.

LARRY D. DONELSON
Clerk
By John D. Cariotto
Deputy

(SEAL)

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

———o———

GARY M. HOLMBERG,

Petitioner,

vs.

ROBERT F. PARRATT, As Warden of the Nebraska Penal and Correctional Complex,

Respondent.

———o———

CIV. 76-L-4

MEMORANDUM OPINION

This is an action for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner Gary M. Holmberg was convicted in the District Court for Keith County, Nebraska, of unlawful possession of marijuana with the intent to distribute, deliver, or dispense, unlawful possession of amphetamines, and unlawful possession of cocaine. He was sentenced to and is presently serving a one-year sentence in the Nebraska Penal and Correctional Complex. Petitioner has exhausted all available state remedies.

The basic facts, with respect to which there is no dispute, are summarized as follows:

Petitioner was operating a motor vehicle, a pickup

with a camper shell attached, in the early morning hours on Interstate 80 in Keith County, Nebraska, proceeding in an easterly direction. Officer Hollis Compton, a member of the Nebraska State Highway Patrol, wearing his official uniform, stopped the petitioner for the sole purpose of checking his operator's license, the vehicle registration and the vehicle identification number. Concededly, there was no other reason for the stop. While checking the license and registration, the officer smelled a distinctive odor and observed what he believed to be marijuana seeds on the floor of the vehicle. Upon questioning, the petitioner stated he had not been smoking marijuana, but later admitted the same. The officer then asked to look into the camper. Petitioner, apparently offering some resistance, did get the keys and unlock the camper. When the camper door was opened, the officer detected a strong odor which he associated with the smell of marijuana.

The record reveals that Officer Compton then searched the camper and found several green plastic bags of marijuana hidden in a wooden box attached to the inside wall of the camper. The petitioner was placed under arrest and taken to Ogallala, Nebraska, whereupon a search of his person and belongings disclosed amphetamines and cocaine. He was subsequently charged with the unlawful possession of marijuana with the intent to distribute, deliver or dispense, unlawful possession of amphetamines, and unlawful possession of cocaine.

The petitioner's motion to suppress the above-mentioned evidence was sustained by the District Court of Keith County, Nebraska. Upon the state's application for summary review pursuant to Neb. Rev. Stat. § 29-

824 (Reissue 1964), a single Justice of the Nebraska Supreme Court reversed the District Court order. The petitioner was thereafter tried and convicted of the charges in question. The convictions were affirmed on appeal, *State v. Holmberg,* 194 Neb. 337, 231 N. W. 2d 672 (1975).

The only issue raised herein is whether the initial stop of petitioner's vehicle violated his Fourth Amendment rights made applicable to the states by the Fourteenth Amendment. *Mapp v. Ohio,* 367 U. S. 643 (1961). If the officer acted beyond the scope of his constitutional authority in stopping the petitioner, the fruit of the subsequent searches should have been inadmissible at trial.[1] *United States v. Nicholas,* 448 F. 2d 622, 623 (8th Cir. 1971), and cases cited therein.

The sole justification for having made the stop is Neb. Rev. Stat. § 60-435 (Reissue 1974), which provides in pertinent part:

> [A]ll members of the Nebraska State Patrol * * * shall have the power * * * (4) when in uniform, to require the driver thereof to stop and exhibit his operator's license and registration card issued for the vehicle and submit to an inspection of such vehicle, the registration plates and registration cards thereon * * *.

The question here, of course, "is not whether the search (or seizure) was authorized by state law. The question is whether the search was reasonable under the Fourth Amendment." *Sibron v. New York,* 392 U. S. 40, 61 (1968), *quoting, Cooper v. California,* 386 U. S. 58, 61 (1967)

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[1]At the hearing on this matter, the state conceded that the writ of habeas corpus must be granted if the initial stop was constitutionally infirm.

There is no doubt that the initial stop of petitioner's vehicle was a "seizure" under the Fourth Amendment. *United States v. Nicholas, supra,* at 624; *Carpenter v. Sigler,* 419 F. 2d 169, 171 (8th Cir. 1969). "[A]nd the Fourth Amendment requires that the seizure be 'reasonable.' " *United States v. Brignoni-Ponce,* 422 U. S. 873, 878 (1975) (See and compare to the instant case.) In *Sibron v. New York, supra,* a case involving a police-citizen street encounter, the Supreme Court noted:

> The police officer is not entitled to seize and search every person he sees on the street or of whom he makes inquiry. Before he places a hand on the person of a citizen in search of *anything,* he must have *constitutionally adequate, reasonable grounds* for doing so.
>
> *Id.* at 64. (Emphasis added.)

In assessing the reasonableness of a routine investigation of a vehicle traveling on the highway, the Court of Appeals for the Eight Circuit has adopted the criteria set out by the Supreme Court in *Terry v. Ohio,* 392 U. S. 1 (1968), a companion case to *Sibron v. New York, supra. United States v. Geelan,* 509 F. 2d 737, 743 (8th Cir. 1974), *cert. denied,* 421 U. S. 999 (1975); *United States v. Nicholas, supra,* at 624; *Carpenter v. Sigler, supra,* at 171.

Terry requires a two-step approach in determining whether a seizure is reasonable under the Fourth Amendment:

1) Whether the officer's action was justified at its inception; and
2) Whether it was reasonably related in scope to the circumstances which justifies the interference in the first place.

The first inquiry is, therefore, whether stopping the petitioner's vehicle was reasonable under the circumstances.

> *[I]n justifying the particular intrusion the police officer must be able to point to specific and articuable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.* The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to an officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate. Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. And simple " 'good faith on the part of the arresting officer is not enough.' * * * If the subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in person, houses, papers, and effects,' only in the discretion of the police.
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> *Terry v. Ohio, supra,* at 21-22. (Citations in test omitted) (Emphasis added.)

Applying the *Terry* analysis to the facts in this case, it is abundantly clear that Officer Compton had no "specific articuable facts" whatsoever for stopping the petitioner's vehicle and the state admits the same.

The Eight Circuit has upheld license and vehicle registration stops pursuant to state statutes similar to Section 60-435, but only upon a showing of suspicious circumstances.

> We have readily upheld the right of a police patrol to make an investigatory stop of a motor vehicle traveling *under suspicious circumstances,* especially when state statutes authorize the officer to make routine investigations of licenses and motor vehicle registrations. E.g., Orricer v. Erickson, 471 F. 2d 1204 (8th Cir. 1973); Carpenter v. Sigler, supra; Rogers v. United States, 362 F. 2d 358, 362 (8th Cir.), *cert. denied,* 385 U. S. 993, 87 S. Ct. 608, 17 L. Ed. 2d 454 (1966).
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> *United States v. Geelan, supra,* at 744. (Emphasis added.)[2]

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[2]This issue was also addressed by the Court in *United States v. Nicholas, supra,* at 624:

> Implicit in the government's argument that the police were merely performing routine investigation is the theory that the police, under Missouri law, are permitted to approach the driver of any vehicle for purposes of examining his driver's license, even without meeting the standards of Terry. If the police had such power, we would be hard pressed to declare that the power could be obviated merely by the fact that the officer makes his approach on the basis of other suspicion. See, United States of America v. Turner, 442 F. 2d 1146 (8th Cir. 1971). Turner, also involving an arrest under Missouri law, addressed itself to this point; but there the parties assumed that the police had such power. (Footnote: Our examination of Missouri law indicates that there is no general power, either by virtue of statute or common law, to approach the driver of any vehicle absent suspicious circumstances. See, V.A.M.S. §§ 43.160-43.220; 85.230; 85.340 and 85.561). No such concession was made here; rather the right of the police to approach a driver under these circumstances is hotly contested.

As do the Courts in United States v. Bell, 383 F. Supp. 1298, 1302 (D. Neb. 1974), and United States v. Carter, 369 F. Supp. 26, 30 (E.D. Mo. 1974), this Court views the Nicholas decision more as support for its conclusion than as contrary authority.

Justice McCown recognized this same restriction in a dissenting opinion in the petitioner's case before the Nebraska Supreme Court.

> It seems transparently clear than an indiscriminate random stop of a single motor vehicle without any grounds for reasonable suspicion of any law violation, which can be made at the whim of any law officer, is an arbitrary interference with an individual's right to personal security and is unreasonable within the ambit of the Fourth Amendment. The initial seizure here being unconstitutional, the motion to suppress should have been granted.
>
> *State v. Holmberg, supra,* at 353, 231 N. W. 2d at 681 (Dissenting opinion.)

The state argues that stopping a vehicle is the only practical method of enforcing Section 60-435. Such an argument, however, should not and cannot justify the unwarranted intrusion and infringement upon an individual's constitutional right. Otherwise, such rights could be emasculated by statute alone.[3] The Fourth

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[3]A similar argument might be made with respect to the enforcement of Neb. Rev. Stat. § 28-1001 (Reissue 1964), which prohibits the carrying of a concealed weapon except under certain circumstances. As in the instant case, it can be argued that there is no practical method to assure strict compliance with this provision except to arbitrarily stop persons on the street and subject them to a search of their person. Yet no one would seriously contend that the Fourth Amendment would permit such a procedure.

Amendment requires all seizures to be reasonable and in the context of random license and vehicle registration checks, it demands something more than the broad and unlimited, albeit good faith, discretion of law enforcement officers.

Accordingly, this Court holds that the random stop of petitioner's vehicle without any founded and reasonable suspicion of criminal activity violated his Fourth Amendment rights against unreasonable search and seizure. "To hold otherwise would be to give the police absolute, unreviewable discretion and authority to intrude into an individual's life for no cause whatsoever." *State v. Holmberg, supra,* at 349, 231 N. W. 2d at 679 (J. McCown dissenting), *quoting, Commonwealth v. Swanger,* 453 Pa. 107, 307 A. 2d 875 (1973).

Having decided that the officer's action was unjustified at its inception, the Court need not consider whether the scope of the action was permissible under the second step of *Terry.*

This Court declines to meet the issue of the facial constitutionality of Section 60-435. "The constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case." *Sibron v. New York, supra,* at 59. As has been noted before, however, "[t]his Court, in considering future cases, will narrowly construe such a statute to the extent that there must be a *founded and reasonable suspicion* drawing an officer's attention in order for him to pursue a selective stop," of a motor vehicle and its occupant. *United States v. Bell, supra,* at 1303. (Emphasis added.)

A separate order dated June 11, 1976, has heretofore been entered in accordance with this Memorandum Opinion (See Filing No. 18).

BY THE COURT:
Wilbur G. Schatz
JUDGE, UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS

FOR THE EIGHT CIRCUIT

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No. 76-1609

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GARY M. HOLMBERG,
Appellee,

vs.

ROBERT F. PARRATT, as Warden of the Nebraska Penal and Correctional Complex,
Appellant.

---o---

Submitted: November 12, 1976

Filed: February 1, 1977

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Before LAY, BRIGHT, and STEPHENSON, Circuit Judges.

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LAY, Circuit Judge.

Petitioner Gary Holmberg was convicted in a Ne-

braska state court of possession of marijuana with intent to distribute, deliver or dispense; of possession of amphetamines: and of possession of cocaine. He was sentenced to a term of one year and fined. Upon appeal to the Supreme Court of Nebraska he urged that his Fourth Amendment rights against illegal search and seizure had been violated. The court rejected this argument and affirmed the conviction. *State v. Holmberg,* 194 Neb. 337, 231 N. W. 2d 672 (1975) (McCown, J., dissenting).

> Petitioner then sought and was granted a writ of habeas corpus in the federal district court on the ground that the search of petitioner's car violated his Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review. Our decision does not mean that the federal court lacks jurisdiction over such a claim. . . .

Id. at 3052 and n. 37 (footnote 36 omitted).

This court has applied *Stone v. Powell, supra,* retroactively. *See Rigsbee v. Parkinson,* No. 76-1573 (8th Cir., Nov. 19, 1976).

Under the circumstances we do not review the merits of petitioner's constitutional claim. We are bound to apply *Stone v. Powell, supra,* since the petitioner did receive a full and fair hearing in the Nebraska state court. As we read *Stone v. Powell, supra,* it is immaterial whether the state court misapplies the Fourth Amendment in reviewing a state court conviction. Erroneous application of Fourth Amendment principles by a state court is no longer relevant to the

question of whether the federal court may review the merits of the claim.

We note that in deciding *Stone v. Powell, supra,* the Supreme Court recognized the viability of the Supremacy Clause and the need to have the states uniformly apply the Fourth Amendment. It noted that these needs can be fully protected by a state court defendant applying for certiorari from the judgment of the highest state court. 96 S. Ct. at 3051 n. 35.

In the present case the petitioner did not apply for certiorari from the Supreme Court of Nebraska. However, under the circumstances we do not view the absence of a petition for certiorari from the state conviction to be part of the "full and fair hearing" contemplated in *Stone v. Powell, supra.*[2] Nonetheless, in view of our vacating the district court's grant of the writ on a *procedural* basis, and in order that petitioner has a full opportunity for federal review consistent with the Supremacy Clause, we direct petitioner's counsel to

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[1]In Wolff v. Rice, 96 S. Ct. 3037 (1976), the companion case described with Stone v. Powell, 96 S. Ct. 3037 (1976), the petitioner's Fourth Amendment right was clearly violated by an illegal search, (see the opinion below, Rice v. Wolff, 513 F. 2d 1280 (8th Cir. 1975)), but the Supreme Court did not review that claim since it held that the petitioner had a full and fair hearing in the state court.

[2]The Supreme Court in Stone v. Powell, supra, considered the argument that a petitioner may have relied on Kaufman v. United States, 394 U. S. 217 (1969), by failing to file a petition for certiorari with the United States Supreme Court, and found it insufficient to justify only prospective application of its holding. 96 S. Ct. at 3052 n. 38. This finding also indicates that a petition for certiorari is not a requisite part of the "full and fair hearing in state court."

petition for certiorari from our judgment of reversal, raising the constitutional ground. The Supreme Court can refuse to hear the case or grant certiorari and review the merits.

Assuming the Supreme Court denies certiorari and in view of the fact that petitioner has only a short time remaining to serve on his sentence, we suggest, but do not require, that the Nebraska Board of Parole grant an immediate hearing on petitioner's parole and give every consideration to his release. Assuming petitioner has readjusted to society while on bail, this action would avoid disruption of his attempt to rehabilitation. It would be best if this hearing be held before the petitioner is taken back into custody. Petitioner should not be prejudiced for pursuing his habeas remedy pursuant to the federal law which governed his rights prior to *Stone v. Powell, supra.*

Judgment granting the writ of habeas corpus is vacated; the cause is remanded to the district court with directions to dismiss the petition.

BRIGHT, Circuit Judge, dissenting:

In *Stone v. Powell,* 96 S. Ct. 3037, the Court answered negatively this question:

> The question is whether state prisoners — who have been afforded the opportunity for full and fair consideration of their reliance upon the exclusionary rule with respect to seized evidence by the state courts at trial and on direct review — may invoke their claim again on federal habeas corpus review. The answer is to be found by weighing the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims. [*Id.* at 3049.]

Stone was decided after the district court entered its judgment in this case. The special circumstances of this case persuade me that *Stone* should not be applied retroactively here. The fourth amendment issue raised here is not the sort which *Stone* decided did not warrant application of the exclusionary rule on collateral review. The contention advanced on the merits is important and should be addressed, and federal review of Holmberg's claim may well have been forclosed due to Holmberg's reliance on the Supreme Court's previous rulings which clearly invited resort to federal habeas corpus preliminary to seeking certiorari review in the Supreme Court.

In the *Powell* case, the Court noted these circumstances. Powell was arrested by Nevada police for violation of a Henderson, Nevada, vagrancy ordinance. In a search incident to that arrest, the police discovered a weapon which expert testimony connected to a murder in California. Powell was convicted of murder in California after extradition to that state. Powell contended that his arrest was made under an unconstitutional ordinance and thus the subsequent seizure of the weapon violated his fourth amendment rights. The argument attacking the constitutionality of the Nevada ordinance was not reached by the California appellate court because "the error, if any, in admitting the [challenged] testimony * * * was harmless beyond a reasonable doubt." *Id.* at 3040.

In *Wolff v. Rice,* decided with *Stone v. Powell,* the defendant Rice unsuccessfully attacked the validity of a search warrant under which police had seized incriminating evidence from Rice's home. The Supreme Court of Nebraska affirmed Rice's murder conviction,

holding that the search of Rice's home had been pursuant to a valid search warrant. *Id.* at 3041.

In rejecting Powell's and Rice's attempts to invoke the exclusionary rule on federal habeas corpus, Justice Powell noted that

> [t]he disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice. These long-recognized costs of the rule persist when a criminal conviction is sought to be overturned on collateral review on the ground that a search-and-seizure claim was erroneously rejected by two or more tiers of state courts. [Id. at 3050 (footnotes omitted).]

The majority opinion concluded:

> In sum, we conclude that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal, and the substantial societal costs of application of the rule persist with special force. [Id. at 3052 (footnotes omitted).]

In *Powell* and *Rice*, the respective state courts passed on alleged violations of the fourth amendment arising from the particular factual contexts of those cases. Those courts were asked to review the actions

of individual state officers to determine whether they had, through mistake or overzealousness, violated the fourth amendment and, if so, what should be done about it. In cases such as those, where police officers and magistrates act on the particular facts before them, the decision in *Stone v. Powell* recognizes that no purpose is served by federal habeas review of these search and seizure issues following appropriate consideration of these issues in state court.

This case, however, presents a different situation. According to a majority of the Nebraska Supreme Court, Neb. Rev. Stat. § 60-435 constitutionally authorizes a state patrolman to stop any motorist at random to check the driver's license or the vehicle's registration, even though there is no reason for the patrolman to believe that the particular motorist has done anything wrong. *State v. Holmberg,* 194 Neb. 337, 231 N. W. 2d 672 (1975). As the federal district court aptly noted, the constitutional issue here is not whether, on a particular set of facts, a police officer through mistake or overzealousness invaded an individual's fourth amendment rights for here the police acted pursuant to a general state policy, enacted by statute. The police officer exercises no judgment when he decides to stop a motorist pursuant to this statute, so it makes no sense to talk about deterring any illegal behavior on his part. The real issue here is whether the State of Nebraska constitutionally may apply its statute as to give highway patrolmen carte blanche authority to detain highway travellers at random. Such an application of the statute treads heavily on fourth amendment values. Judge Schatz wrote:

> The state argues that stopping a vehicle is the only practical method of enforcing Section 60-435. Such an argument, however, should not and cannot

justify the unwarranted intrusion and infringement upon an individual's constitutional right. Otherwise, such rights could be emasculated by statute alone. The Fourth Amendment requires all seizures to be reasonable and in the context of random license and vehicle registration checks, it demands something more than the broad and unlimited, albeit good faith, discretion of law enforcement officers.

Accordingly, this Court holds that the random stop of petitioner's vehicle without any founded and reasonable suspicion of criminal activity violated his Fourth Amendment rights against unreasonable search and seizure. "To hold otherwise would be to give the police absolute, unreviewable discretion and authority to intrude into an individual's life for no cause whatsoever." *State v. Holmberg, supra,* at 349, 231 N. W. 2d at 679 (J. McCown dissenting, *quoting, Commonwealth v. Swanger,* 453 Pa. 107, 307 A. 2d 875 (1973). [Footnote omitted.]

The issue presented here is an important one. In a sense, Holmberg represents every motorist travelling the highways of this Nation. The authority which Nebraska claims for its highway patrolmen threatens everyone's freedom of movement in a motor vehicle. In order to avoid unconstitutionality, a similar Pennsylvania statute has been construed to limit police officers' authority to stop a vehicle for license and registration checks to cases where the officer has a reasonable suspicion based on specific, articulable facts that the vehicle or driver is in violation of the law. *See, e.g., Commonwealth v. Swanger,* 453 Pa. 107, 307 A. 2d 875 (1973). Thus, given these court interpretations, the fourth amendment rights of travellers change as they cross state borders. Clearly, some final resolution of this issue should be reached.

Of course, the Supreme Court has the right to enunciate a single supreme law of the land through its "oversight" certiorari jurisdiction to review state criminal convictions. *Stone v. Powell,* 96 S. Ct. 3037, 3051 n. 35. But this avenue of relief is now foreclosed to Holmberg, as noted in the majority opinion. *See* page 4, majority opinion. Usually, the rule of *Stone v. Powell* applies retroactively. Here, however, Holmberg may have foregone direct review because of the Supreme Court's previous invitation to seek federal review of fourth amendment claims on habeas corpus, rather than immediately seek direct review of the state conviction in the Supreme Court. *See Kaufman v. United States,* 394 U. S. 217 (1969); *Fay v. Noia,* 372 U. S. 391, 437-38 (1963). If *Stone* is applied retroactively, Holmberg will be deprived of any opportunity to seek federal review of his federal constitutional claim, through no fault on his part.

The language of the holding in *Stone v. Powell,* taken literally, bars habeas corpus relief for Holmberg. But the societal interests at stake here are decidedly different than in *Powell,* and Holmberg seeks federal review of important and unsettled constitutional issues. Because of special circumstances, *Stone v. Powell* should not be applied retroactively here.

Thus, I would reach the merits of this appeal.

A true copy.

Attest:
CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.